SUPREME COURT, U. S.

FILED
MAY 29 1973
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1597

ULYSSES VERNON BEASLEY, EMIDIO J. BASSETTI and JOE W. JONES,

Petitioners,

vs.

FOOD FAIR OF NORTH CAROLINA, INC. and RAY F. MESSICK,

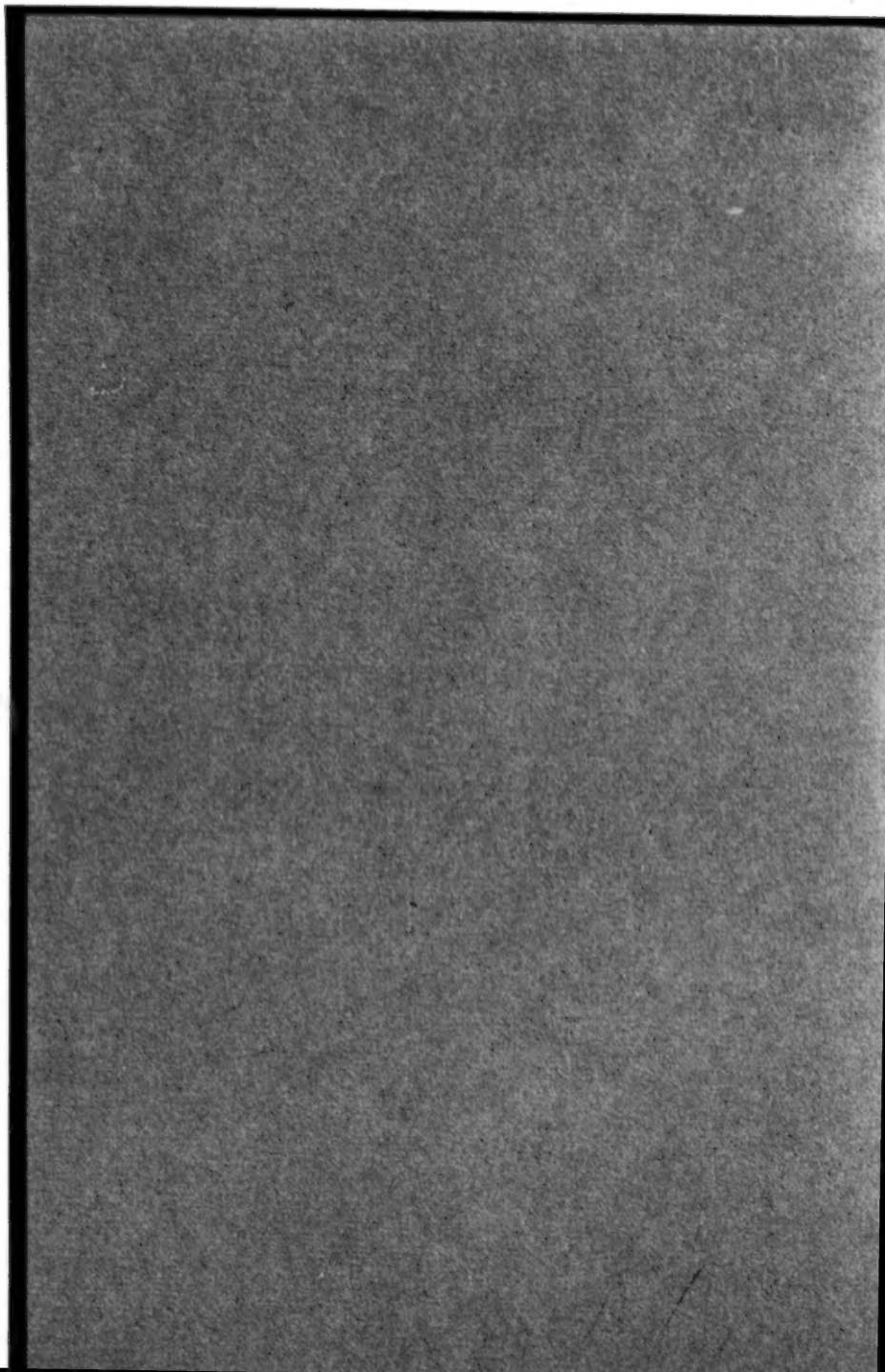
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

LARRY L. EUBANKS,
503 North Carolina National Bank Building
Winston-Salem, North Carolina 27101
Telephone: 919-723-0741
Attorney for Petitioners

Of Counsel:
Douglas S. Punger

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220



INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING WRIT	6
CONCLUSION	14
APPENDIX:	
Order - January 26, 1973	A. 1
North Carolina Right-To-Work Law	A. 19
Labor-Management Relations Act	A. 20
Civil Summons	A. 21
Complaint	A. 23
Motion to Dismiss, Motion for Judgment on the Pleadings, and Plea in Abatement	A. 25
Affidavit - February 23, 1972	A. 26
Letter to Larry L. Eubanks, Esq. from Irving Herman, Director, Office of Appeals, dated December 30, 1971	A. 30
Order extending time for filing petition dated April 26, 1973	A. 31
Order and Judgment - February 28, 1972	A. 32
Appeal Entries - February 28, 1972	A. 33
Assignment of Error	A. 34

AUTHORITIES CITED

Page

Cases:

Carpenter's District Council v. National Labor Relations Board,
107 U.S. App. D.C. 55,
274 F.2d 564 (1959) 9

Hanna Mining v. Marine Engineers,
382 U.S. 181, 15 L.Ed. 2d 254,
86 S.Ct. 327 (1965) 5, 6, 11, 13, 14

Lincoln Fed. L. U. v. Northwestern I. & M. Co.,
335 U.S. 525, 93 L.Ed. 212, 69 S.Ct. 251,
6 A.L.R. 2d 473 (1949) 7

Marine Officers Association, Local No. 54 v. Ohio River Sand Company,
467 S.W.2d 758 (1971) 9

Martineau v. Director of Division of Employment Security,
326 Mass. 44, 106 N.E.2d 420. 9

National Labor Relations Board v. Big Three Welding Equipment Co.,
359 F.2d 77 (5th Cir., 1966) 9

National Labor Relations Board v. Charley Toppino and Sons, Inc.,
332 F.2d 85 (5th Cir., 1964) 9

National Labor Relations Board v. Edward G. Budd Manufacturing Co.,
169 F.2d 571, cert. denied, 335
U.S. 908, 69 S.Ct. 411 (6th Cir., 1948) 8

Page

National Labor Relations Board v. Fullerton Publishing Co., 283 F.2d 545 (9th Cir., 1960) 9

National Labor Relations Board v. Inter-City Advertising Co., 190 F.2d 420 (4th Cir., 1954), cert. denied, 342 U.S. 908, 72 S.Ct. 301 9

Oil City Brass Works v. National Labor Relations Board, 357 F.2d 466 (5th Cir., 1966) 9

Packard Motor Car Co. v. National Labor Relations Board, 330 U.S. 485, 67 S.Ct. 789 (1947) 7-8

Safeway Stores, Inc. v. Retail Clerks International Association, 41 Cal. 2d 567, 261 P.2d 721 8

San Diego Unions v. Garmon, 359 U.S. 236, 2 L.Ed. 2d 775, 79 S.Ct. 773 . . . . . 5, 6, 11, 13, 14

State v. Whitaker, 228 N.C. 352, 45 S.E. 2d 860 (1947) 7

Texas Co. v. National Labor Relations Board, 198 F.2d 540 (9th Cir., 1952) 9

Statutes, Federal Rules and Regulations:

North Carolina Right-To-Work Law, Chap. 328, Sess. Laws of 1947, codified as North Carolina General Statutes 95,
Sections 78-84 2
Sections 95-78, 95-81 . . . . . 4-5, 6, 7

	Page
S. Rep. 105, 80th Cong., 1st Sess. p. 5	13
S. Rep. 105, 80th Cong., 1st Sess. p. 28	13
H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. p. 60	13
National Labor Relations Act:	
29 U.S.C. Section 152(3)	8
Sec. 2(3)	8
29 U.S.C.A. Sec. 158 Sec. 8	11
Section 8(a)(1) and (3), as amended, 29 U.S.C. 141, *et seq.*	4
Section 14(a), codified as 29 U.S.C. Section 164(a)	2, 7, 10, 12
29 U.S.C. Section 164(b)	7
Section 2(11)	4
Section 8(b)	13

Supreme Court of the United States

OCTOBER TERM, 1972

No.

ULYSSES VERNON BEASLEY, EMIDIO J. BASSETTI and JOE W. JONES,

Petitioners,

vs.

FOOD FAIR OF NORTH CAROLINA, INC. and RAY F. MESSICK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered in the above case on January 26, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of North Carolina is reported at 15 N.C. App. 323, 190 S.E. 2d 333 (1972), which reversed summary judgment for defendant

entered by the Honorable Judge J. Gambill, at the 28 February, 1972, Session of the Forsyth County Superior Court. The opinion of the Supreme Court of the State of North Carolina is reported in 282 N.C. 530, 193 S.E. 2d 911.

JURISDICTION

The judgments of the Supreme Court of the State of North Carolina were made and entered on January 26, 1973, (193 S.E. 2d 911), and copies thereof are appended to this petition in the Appendix at pp. 1-16. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

Whether there is any federal law which pre-empts a state from enacting a statute prohibiting an employer from discharging a person, *i.e.*, a supervisor, for membership in a labor union, organization, or association.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The pertinent portions of the North Carolina Right-to-Work Law, Chapter 328, Session Laws of 1947, codified as North Carolina General Statutes 95, Sections 78 through 84, are set forth in the Appendix at pp. 19-20.

In addition, Section 14(a) of the National Labor Relations Act, codified as 29 U.S.C. Section 164(a) is set forth in Appendix at p. 20.

STATEMENT

The plaintiffs, ULYSSES VERNON BEASLEY, EMIDIO J. BASSETTI, and JOE W. JONES, were, until June 26, 1971, employed by the defendant, FOOD FAIR OF NORTH CAROLINA, INC.. On the above mentioned date, two days after Local Union No. 525 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, won a majority in a National Labor Relations Board election, they were discharged. The plaintiffs, through counsel, have steadfastly averred that the said discharge was unlawful in that the plaintiffs were discharged solely due to their membership in the aforesaid Union.

The Union began an organizing campaign at defendant's Winston-Salem, North Carolina stores in the spring of 1971. In the course of that organizing campaign, the three plaintiffs named herein signed membership applications to join the Union and were accepted into membership in April and May of 1971.

On May 18, 1971, the local Union petitioned the National Labor Relations Board for an election among "all meat department employees at the Employer's stores in Forsyth County, North Carolina, but excluding store managers, assistant store managers, grocery employees, produce employees, warehousemen, cashiers, office clerical employees, guards, and supervisors as defined in the Act:" (Case No. 11-RC-3330). The Board granted the petition and ordered the election to be held on June 24, 1971. The three plaintiffs herein were excluded from participating in the election since they were determined by the Board to be supervisors. Directly after the election, they were discharged by defendant Messick, President of Food Fair Stores of North Carolina, Inc..

In June of 1971, the Union brought charges before the National Labor Relations Board alleging, *inter alia*, the discharge of the plaintiffs herein to be violations of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended 29 U.S.C. 141, *et seq.*. (Case No. 11-CA-4622). It was the considered opinion of the General Counsel of the National Labor Relations Board that the plaintiffs were supervisors within the meaning of Section 2(11) of the National Labor Relations Act and hence not entitled to the protection of the Act. (See letter dated December 30, 1971 – Record on Appeal to North Carolina Court of Appeals, Appendix p. 30.)

Immediately following the Board's decision that the three plaintiffs herein were not protected by Federal law, the complaint in the case at bar was filed. It alleges basically a violation of North Carolina General Statutes 95-78, 95-81 and 95-83 (see Appendix pp. 21-25).

The defendant's Motion To Dismiss, Motion For Judgment on the Pleadings, and Plea in Abatement were heard by Judge Robert M. Gambill on February 21, 1972, (R pp. 3-6, see Appendix pp. 25-29. Among other averments, the defendants asserted that the National Labor Relations Board had exclusive jurisdiction over the subject matter of this action and that as supervisors the plaintiffs were therefore not protected by the provisions of North Carolina General Statute 95-78 *et seq.* Judge Gambill ruled, by Order dated February 28, 1972, that the plaintiffs had failed to state a claim upon which relief could be granted and further that there was no genuine issue as to any material fact and that the defendants were entitled to judgment as a matter of law. (See Appendix pp. 32-33).

The plaintiffs appealed, excepting and assigning as error the ruling that the plaintiffs were not protected by North

Carolina General Statutes 95-78 *et seq.* The appeal was heard by the Court of Appeals of North Carolina during the spring term of 1972, and the full panel of judges reversed the decision of the lower Court on August 2, 1972. (190 SE 2d 333). The Court of Appeals, interpreting the decision of the United States Supreme Court in *Hanna Mining v. Marine Engineers,* 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965) as it relates to the decision in *San Diego Unions v. Garmon,* 359 U.S. 236 3 L.Ed. 2d 775, 79 S.Ct. 773, held:

> "That a state does have jurisdiction over activities of supervisors because the activities of supervisors could not be arguably either prohibited or protected under the Act (National Labor Relations Act), we reach the conclusion that in the case before us where, as in *Hanna,* the union members involved have been classified by the National Labor Relations Board as supervisors, the State Court has jurisdiction."

This view expressed by the North Carolina Court of Appeals was espoused by the plaintiffs in their initial brief before that Court:

> "Counsel must, in order to fully protect its position, establish: . . . (2) That the matter is not covered or pre-empted by Federal law, and is therefore subject to state law . . ."

Immediately upon rendition of the North Carolina Court of Appeals decision the defendants petitioned the Supreme Court of North Carolina for Certiorari, and it was granted on August 15, 1972. The defendants challenged the North Carolina Court of Appeals' interpretation

of Federal law and in particular its interpretation of the *Garmon Doctrine* and the *Hanna Mining Case.*

On January 23, 1973, the North Carolina Supreme Court published its decision reversing the North Carolina Court of Appeals. Stating its conclusion:

> "When, as in the present case, the facts disclose that plaintiffs as supervisors seek to invoke a remedy precluded by the established national policy, the doctrine of federal pre-emption applies, and the State Court is without jurisdiction over the subject matter of the controversy." (See Appendix pp. 1-18.)

The plaintiffs submit that the aforesaid decisions of the North Carolina Court of Appeals and the North Carolina Supreme Court do involve a material and substantial question of Federal law and that their evident diversity of opinion requires a hearing before the United States Supreme Court in order to clarify and firmly establish the meaning and import of its prior decisions in *Garmon* and *Hanna Mining, supra.*

REASONS FOR GRANTING WRIT

The decision below should be reviewed because it erroneously interprets the decisions of the Supreme Court in the cases of *San Diego Unions v. Garmon, supra,* and *Hanna Mining v. Marine Engineers, supra,* as they relate to the Federal Labor Law pre-emption doctrine.

The plaintiffs ground their claim for relief upon the North Carolina Right-to-Work Laws (North Carolina General Statutes 95-78 *et seq.*). These laws have been upheld by the Supreme Court of North Carolina and the United

States. *State v. Whitaker*, 228 N.C. 352, 45 S.E. 2d 860 (1947); *Lincoln Fed. L. U. v. Northwestern I. & M. Co.*, 335 U.S. 525, 93 L.Ed. 212, 69 S.Ct. 251, 6 A.L.R. 2d 473 (1949); 29 U.S.C. Section 164(b). The basic philosophy of these laws is expressed in North Carolina General Statute 95-78 as follows:

> "The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraint and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union of labor organization or association. (1947, C. 328, S.1).

The statutes further provide that persons may maintain causes of action for damages against their employer for violation of their provisions. (North Carolina General Statute 95-83). The plaintiffs assert that they are entitled to the protection of the North Carolina Right-to-Work Laws as they were discharged from their employment for no reason other than their membership in a labor union.

The question now before the Court is whether there is any federal law which pre-empts a state from enacting a statute which prohibits an employer from discharging a person, *i.e.* a supervisor, for membership in a labor union, organization, or association.

Prior to its amendment in 1947, the National Labor Relations Act specifically protected the right of all persons regardless of employment status to join or assist labor organizations. *Packard Motor Car Co. v. National*

Labor Relations Board, 330 U.S. 485, 67 S.Ct. 789 (1947). In 1947, however, following the *Packard* decision, the Taft-Hartley amendment was passed. These amendments specifically limited coverage of the Act to "employees" as defined in Section 2(3) of the Act. (29 U.S.C. Section 152 (3)), thereby excluding supervisors.

The belief held by the plaintiffs and others that these amendments did exclude supervisors from the scope of the Act was first determined in 1948 in the case of *National Labor Relations Board v. Edward G. Budd Manufacturing Co.*, 169 F.2d 571, cert. denied, 335 U.S. 908, 69 S.Ct. 411 (6th Cir. 1948):

> "The right of self-organization and of selection of a bargaining representative are rights which existed independently of either National or Local Labor Relations Acts. It was recognized and characterized as a fundamental right long before it was protected under the National Labor Relations Act and similar state acts . . . It was the regulation of this fundamental right of supervisory personnel formerly included within the Federal Act that the 1947 amendatory provisions left to the states for separate classification and regulation." *Id.* at p. 577.

This position was quickly adopted by the State Courts throughout the country having occasion to deal with the subject. The California Court, in *Safeway Stores, Inc. v. Retail Clerks International Association*, 41 Cal. 2d 567, 261 P.2d 721, held the exclusion of supervisory employees and the regulation of their collective bargaining rights from the National Labor Relations Act, as amended, left

the field open completely to State control. The same conclusion is reached in *Martineau v. Director of Division of Employment Security*, 329 Mass. 44, 106 N.E.2d 420. It is now clear that it is not a violation of the National Labor Relations Act to discharge a supervisor because of membership in a labor organization, though nothing in the Federal law prevents a supervisor from joining a labor organization. *National Labor Relations Board v. Inter-City Advertising Co.*, 190 F.2d 420, (4th Cir., 1954), cert. denied, 342 U.S. 908, 72 S.Ct. 301; *Texas Co. v. National Labor Relations Board*, 198 F.2d 540 (9th Cir., 1952); *Marine Officers Association, Local No. 54 v. Ohio River Sand Company*, 467 S.W.2d 758 (1971).

The Supreme Court of North Carolina, in its decision in the case at bar, has cited numerous federal cases which have held that a supervisor is not protected under the National Labor Relations Act from discharge due to union membership or activity. *National Labor Relations Board v. Big Three Welding Equipment Co.*, 359 F.2d 77 (5th Cir., 1966); *National Labor Relations Board v. Charley Toppino and Sons, Inc.*, 332 F.2d 85 (5th Cir., 1964); *Oil City Brass Works v. National Labor Relations Board*, 357 F.2d 466 (5th Cir., 1966); *National Labor Relations Board v. Fullerton Publishing Co.*, 283 F.2d 545 (9th Cir., 1960); *Carpenter's District Council v. National Labor Relations Board*, 107 U.S. App. D.C. 55, 274 F.2d 564 (1959). We do not disagree with the holdings of these cases, but we do disagree with the North Carolina Supreme Court's inference that these cases evidence an intention of Federal law to pre-empt state jurisdiction over the rights of supervisors. The plaintiffs assert that the proper interpretation of all these cases indicates that in each and every case, the National Labor Relations Board

has refused to protect supervisors from wrongful discharge due to lack of jurisdiction and not due to any Federal law directly or indirectly adverse to the supervisor's privilege of membership in a labor organization, union, or association as stated in Section 14(a) of the Act, 29 U.S.C. Section 164(a):

> "*Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization,* but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either National or Local, relating to collective bargaining." (Emphasis added).

The above quoted section has been utilized throughout the course of this appeal, the plaintiffs placing emphasis on the first clause and the defendants stressing the latter. The plaintiffs reaffirm their position that the first clause adds strength to their argument that a state may legislatively protect the right of a supervisor to join a labor union, organization, or association.

Regarding the second clause, the plaintiffs wish to point out that they are seeking a remedy upon a state statute which details certain rights given to all persons within the state. The plaintiffs suggest that, therefore, no employer, the defendant included, is being compelled to deem individuals defined as "supervisors" as "employees" but rather as "persons" which they most certainly are. Whether or not the term "persons" includes supervisors is a matter for the proper State Court to determine. Also, our North Carolina law has nothing to do with collective bargaining.

Where the Supreme Court of North Carolina has envisioned a federal intention to pre-empt the field of

supervisor regulation, the Court of Appeals did not and neither do the plaintiffs. In *San Diego Unions v. Garmon*, 359 U.S. 236, 3 L.Ed. 2d 775, 79 S.Ct. 773 (1959), Mr. Justice Frankfurter, speaking for the majority, laid down certain guidelines when he said:

> "If the Board decides, subject to appropriate federal judicial review, that conduct is protected by Section 7 (29 U.S.C.A. 157), or prohibited by Section 8 (29 U.S.C.A. 158), then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States." 359 U.S., at p. 245.

The above guidelines were further delineated in *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965). That case presents the crux of the plaintiffs' reasons for which this Writ should be granted. Mr. Justice Harlan, speaking for eight members of the Court, held that under the circumstances of that case, the Federal Act did not pre-empt the state's jurisdiction. Plaintiffs, employers, refused to negotiate with a union representing the Marine Engineers until it was established that the Union represented a majority of the engineers. In response the Union picketed the employer's ships. The plaintiffs petitioned the National Labor Relations Board requesting that a representative election be held, but the Board declined stating that the engineers were supervisors and excluded from the definition of employees. The employer's charge alleging a violation of Section 8 (29 U.S.C.A. Section 158) of the Act was dismissed on the ground that the Union's conduct fell outside

the provisions of the Act because it sought to represent "supervisors" rather than "employees". The employers next brought suit in the Wisconsin State Court seeking injunctive relief, and their suit was dismissed for lack of jurisdiction. The Wisconsin Supreme Court affirmed asserting that the matter was governed by federal law and within the exclusive jurisdiction of the National Labor Relations Board.

In reversing, the United States Supreme Court said:

> "The ground roles for pre-emption in Labor Law, emerging from our *Garmon* decision, should first be briefly summarized: in general, a state may not regulate conduct arguably 'protected by Section 7, or prohibited by Section 8' of the National Labor Relations Act, see 359 U.S., at 244-246, and the legislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation, Cf. 359 U.S. at 245.
>
> For the reasons that follow, we believe the Board's decision that Hanna engineers are supervisors removes from this case most of the opportunities for pre-emption." 382 U.S., at pp. 187-188.

The Court further reasoned that when the Act was amended in 1947 to remove supervisors from the definition of employees, many provisions of the Act employing that pivotal term would cease to operate where supervisors were concerned. The defendants argued, therefore, that Section 14(a) of the Act (29 U.S.C. Section 164(a)) signified a federal policy of Laissez-faire toward supervisors

ousting state as well as Board authority. The Court held that such an argument would not stand up in the light of the legislative history of the amendments. The committee reports reveal that Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees. S. Rep. No. 105, 80th Cong., 1st Sess., p. 5. Whether the legislators fully realized that their method of achieving this result incidentally freed supervisors' unions from certain limitations under the newly enacted Section 8(b) (29 U.S.C. Section 158(b)) is not wholly clear, but certainly Congress made no considered decision generally to exclude state limitations on supervisory organizing. 389 U.S., at pp. 189-190.

Some legislative history pertaining to Section 14(a) of the Act, quoted above, suggests further that it was not meant to immunize any conduct at all but only to make it "clear that the amendments to the Act do not prohibit supervisors from joining unions . . . " S. Rep. No. 105, 80th Cong., 1st Sess. p. 28; H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 60.

The plaintiffs aver that the North Carolina Court of Appeals properly construed the *Hanna* decision to say that state law is not pre-empted by Federal law in the instant case. The plaintiffs suggest that no case like this has ever been adjudicated by the Supreme Court and therefore deserves the Court's attention. There is no question that *Hanna* and *Garmon* describe a shadowy area over which Federal law may extend its ever flowing cool shade, but the plaintiffs seriously question whether the facts in controversy present such a situation. The North Carolina Right-to-Work Laws state clearly that no person shall be discharged for membership in a labor organization, association,

or union. If there is a Federal law or an intention inferred by Federal law which denies the plaintiffs of this simply stated right, the plaintiffs would hope that it too could be stated as simply and clearly.

CONCLUSION

The plaintiffs respectfully seek the Court's review of the Supreme Court of North Carolina's decision in view of the conflicting and possible erroneous interpretation of the *Garmon Doctrine* and the *Hanna Manufacturing Company* case.

Although the point of law herein presented in controversy is small in scope, the effect of any final decision will be large in precedent. Citing from a petition for leave to file an *amici curiae* brief, this decision will directly effect over 270,000 employees. Wherefore, the plaintiffs seek your consideration of the federal questions presented.

LARRY L. EUBANKS,
503 North Carolina National Bank Building
Winston-Salem, North Carolina 27101
Telephone: 919-723-0741
Attorney for Petitioners

Of Counsel:
Douglas S. Punger

APPENDIX

SUPREME COURT OF NORTH CAROLINA

ULYSSES VERNON BEASLEY,
JAMES A. KIGER, EMIDIO
J. BASSETTI, and JOE W. JONES,
Petitioners,

v. No. 66 Forsyth

FOOD FAIR OF NORTH CAROLINA, INC.,
and RAY F. MESSICK,
Respondents.

- - - - - - - -

[Filed January 26, 1973]

On *certiorari* to review the decision of the Court of Appeals reported in 15 N.C. App. 323, 190 S.E. 2d 333 (1972), which reversed summary judgment for defendant entered by Gambill, J., at the 28 February 1972 Session of Forsyth Superior Court.

Plaintiffs jointly brought this action asking for $500,000 actual damages and $1,000,000 punitive damages without separation of damages as to each plaintiff. They allege that they were unlawfully discharged because of their support of and membership in the Amalgamated Meat Cutters and Butcher Workers of North America, AFL-CIO, in violation of North Carolina's Right-to-Work Law, G.S. 95-31. Plaintiffs further allege that by reason of G.S. 95-83 they were entitled to damages, both punitive and otherwise.

Defendants filed a motion to dismiss, motion for judgment on the pleadings, and plea in abatement, alleging that the National Labor Relations Board had exclusive jurisdiction, precluding the State court's consideration for the reason that plaintiffs were managers of the meat markets in defendant's stores or, in the alternative, plaintiffs as supervisors did not come within the provisions of G.S. 95-78, G.S. 95-81, and G.S. 95-83. Defendants further contend that although the complaint alleged violations as to all four plaintiffs, the damages were alleged collectively without alleging individual damages; and, furthermore, in no event are punitive damages recoverable under G.S. 95-83.

Prior to bringing this action, plaintiffs filed charges with the National Labor Relations Board claiming that the discharges were unlawful under the National Labor Relations Act as amended. The Regional Director of the National Labor Relations Board dismissed the charges for the reason that plaintiffs were supervisors and not employees and, therefore, not entitled to protection of the Act. Plaintiffs appealed the Regional Director's decision, but the appeal was denied by the Board's General Counsel for the same reason.

Ray F. Messick, president of Food Fair of N.C., Inc., and one of the defendants in this action, filed an affidavit stating:

> "Each of the plaintiffs in this action was at the times alleged a manager of the meat market of one of the stores owned and operated by the defendant, Food Fair of N.C., Inc. There is a meat market at each of the corporate defendant stores and the plaintiffs, as meat market managers at their respective

stores, were not responsible to either the store manager or the assistant manager. The meat markets were operated independently and each of the plaintiffs had full supervisory authority over said meat market and the employees in the meat market. Each of the plaintiffs was supervisor of his respective meat market and its employees and had authority to hire, fire or discipline meat market employees, responsibility for directing them and adjusting their grievances by the use of their independent judgment.

"The plaintiffs, as meat market managers, independently and on their own authority scheduled regular hours and overtime hours for meat market employees. Each of the plaintiffs, as meat market managers, exercised their authority to grant time off and to tell meat market employees what to do in their employment in the meat market. Each of the plaintiffs were paid more than other employees, were provided more life insurance by the defendant corporation, got more sick leave and a larger Christmas bonus, as well as a year-end bonus, which the other meat market employees did not receive.

"On June 3, 1971, the Regional Director of the Eleventh Region of the National Labor Relations Board issued an order adjudicating Ulysses Vernon Beasley, James A. Kiger, Emidio J. Bassetti and Joe W. Jones, plaintiffs in this case, as supervisors. This order also included all other meat managers of the defendant corporation."

On 28 February 1972 Gambill, J., entered the following order:

> "THIS CAUSE having been calendared for hearing on the Motion Docket at the February 21, 1972 week of Civil Court in and for Forsyth County, and having come on for hearing before the undersigned Judge of the Superior Court upon the defendants' Motion To Dismiss, Motion For Judgment On The Pleadings, and Plea In Abatement, and all parties having been represented by counsel at said hearing before the undersigned Judge and having filed briefs and presented arguments for their respective clients and positions in the matter;
>
> "And the Court having considered the Motion To Dismiss, Motion For Judgment On The Pleadings, and Plea In Abatement; and the parties having stipulated that each of the plaintiffs in this cause was at all times complained of a supervisor of Food Fair of N.C., Inc.; and the defendants having further filed Affidavit of Ray F. Messick, dated February 23, 1972, without objection; and the Court having further considered the Motions filed as a Motion For Summary Judgment as provided under Rule 12(c) and Rule 56;
>
> "And the Court, having heard the matter and the arguments of counsel for all parties in the same, being of the opinion that the defendants' Motion For Judgment On The Pleadings and To Dismiss should be allowed for that the plaintiffs have failed to state a claim

upon which relief can be granted; and the Court being further of the opinion that the defendants are entitled to summary judgment in their favor pursuant to Rule 56 in that the pleadings, stipulation and affidavits show that there is no genuine issue as to any material fact and that the defendants are so entitled to judgment as a matter of law; and the parties having agreed that the Judgment be presented on this date;

"NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that the defendants' Motion For Judgment On The Pleadings and To Dismiss is hereby allowed; that the Court has further considered said Motion as a Motion For Summary Judgment and that the defendants' Motion For Summary Judgment is hereby allowed; that this action be and the same is hereby dismissed with prejudice; and that the costs of the action be taxed against the plaintiffs."

Plaintiffs Beasley, Bassetti, and Jones appealed. The Court of Appeals in an opinion by Judge Morris, concurred in by Judges Vaughn and Graham, reversed. We allowed *certiorari* on 14 September 1972.

McCAUL, GRIGSBY and PEARSALL by ROBERT C. MOSS; HUDSON, PETRKE, STOCKTON, STOCKTON & ROBINSON by R. M. STOCKTON, JR., and JAMES H. KELLY, JR., for defendant appellants.

LARRY L. EUBANKS for plaintiff appellees Beasley, Bassetti, and Jones.

HAYNSWORTH, BALDWIN and MILES by JAMES M. MILES, Attorneys for Associated Industries, Inc., Capital Associated Industries, Inc., Central Piedmont Industries, Inc., Piedmont Associated Industries, Inc., and Western Carolina Industries, Inc., Amici Curiae.

MOORE, Justice.

The first question posed on this appeal is whether the courts of North Carolina have jurisdiction to adjudicate a claim brought by plaintiffs, supervisors, against their employer for damages resulting from an alleged unfair practice under the provisions of our Right-to-Work Law, Chapter 328, Session Laws of 1947, codified as G.S. 95, Sections 78 through 84.

Plaintiffs were discharged from their employment with defendant Food Fair of N.C., Inc., on June 25 and June 27, 1971. Plaintiffs allege that the discharge contravenes G.S. 95-81, which is as follows:

> "No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment."

Plaintiffs' action for damages is based on G.S. 95-83, which provides:

> "Any person who may be denied employment or be deprived of continuation of his employment in violation of §§95-80, 95-31, and 95-82 or of one or more of such sections, shall

> be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment."

Our Right-to-Work Law has been upheld by this Court and the Supreme Court of the United States. *State v. Whitaker*, 228 N.C. 352, 45 S.E. 2d 860 (1947); *Lincoln Fed. L. U. v. Northwestern I. & M. Co.*, 335 U.S. 525, 93 L. Ed. 212, 69 S. Ct. 251, 6 A.L.R. 2d 473 (1949); 29 USC §164(b). The determinative question then in this case is: Are supervisors entitled to protection under this Act?

Prior to the institution of this action, plaintiffs filed charges with the National Labor Relations Board claiming that their discharges were unlawful under the National Labor Relations Act as amended. The Regional Director of that Board found that the employer was engaged in commerce within the meaning of the Act and it would effectuate the purpose of the Act to assert jurisdiction, but dismissed the charges after determining that the plaintiffs were supervisors and not employees and were not entitled to protection of the Act. The Board's General Counsel denied plaintiffs' appeal for the same reason. Thereafter the plaintiffs instituted this action.

In *Willard v. Huffman*, 250 N.C. 396, 109 S. E. 2d 233 (1959), this Court upheld a judgment for an employee awarding damages sustained as the result of his discharge by his employer for failure to abstain and refrain from membership in a labor union or labor organization. The *Willard* case is distinguishable from the present case in two

important respects. First, in *Willard* the National Labor Relations Board refused to consider plaintiff's claim, stating: "Further proceedings are not warranted inasmuch as the operations of the employer do not appear to meet the required standards to warrant the Board's exercise of its jurisdiction in this matter." In the present case, the National Labor Relations Board had jurisdiction but refused to grant plaintiffs' relief due to the provisions of 29 USC §164(a), which provides:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, *but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either National or Local, relating to collective bargaining.*" (Emphasis added.)

Secondly, plaintiff in *Willard* was an employee clearly entitled to protection under our Right-to-Work Law, while in the present case plaintiffs were admittedly supervisors.

The National Labor Relations Act as amended distinguishes supervisors from employees. 29 USC §152(3) provides, *inter alia:* "The term 'employee' shall include any employee . . . but shall not include . . . any individual employed as a supervisor . . . ." 29 USC §152(11) defines the term "supervisor" as: ". . . . (A)ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances. . . ."

Since the 1947 amendments to the National Labor Relations Act, the federal courts have been called upon on numerous occasions to determine the relative rights of employers and supervisors under that statute. The federal courts have consistently held that a supervisor is not protected under the statute from discharge due to union membership or activity. In *N.L.R.B. v. Big Three Welding Equipment Co.*, 359 F.2d 77 (5th Cir. 1966), the Court decided that a "dispatcher" of company trucks and drivers was a supervisor. Based upon that determination, it was held that the plaintiff was not entitled to reinstatement and back pay because of his discharge for union membership and activity. *Accord, N.L.R.B. v. Charley Toppino and Sons, Inc.*, 332 F.2d 85 (5th Cir. 1964). In *Oil City Brass Works v. N.L.R.B.*, 357 F.2d 466 (5th Cir. 1966), the same Court said:

> "If Hammock was fired solely because of his union affiliation, there has been no unfair labor practice on which the Board can predicate its order. The National Labor Relations Act does not protect supervisory personnel. [Citations omitted.] It is settled that the Act does not preclude a company from firing or refusing to recall from layoff status a supervisory employee solely because that employee is affiliated with a union. [Citations omitted.]"

The Ninth Circuit Court of Appeals reached the same conclusion in *N.L.R.B. v. Fullerton Publishing Company*, 203 F.2d 545 (9th Cir. 1960). In that case the county news editor of a newspaper was deemed to be a supervisor. The Court then said:

> "The law is clear that a supervisor is not entitled to the protection afforded ordinary

> employees under the National Labor Relations Act, and as to supervisors there can be no such thing as a discriminatory discharge or unfair labor practice . . . ."

Accord, N.L.R.B. v. Inter-City Advertising Co., 190 F.2d 420 (4th Cir. 1951), cert. den., 342 U.S. 908, 96 L. Ed. 679, 72 S. Ct. 301 (1952); *N.L.R.B. v. Griggs Equipment, Inc.*, 307 F.2d 273 (5th Cir. 1962).

The federal cases go further than merely holding that the National Labor Relations Act affords supervisory personnel no protection. These cases recognize the existence of the legislative intent on the part of Congress to leave employers unfettered in dealing with union affiliation on the part of their supervisory personnel. *N.L.R.B. v. Edward G. Budd Mfg. Co.*, 169 F.2d 571 (6th Cir. 1948), cert. den., 335 U.S. 908, 93 L. Ed. 441, 69 S. Ct. 411 (1949), was one of the first cases dealing with supervisors decided after the 1947 amendments to the National Labor Relations Act. There the Court discussed the intent of Congress in enacting the amendments:

> "We believe it is clear that Congress intended by the enactment of the Labor Management Relations Act that employers be free in the future to discharge supervisors for joining a union, and to interfere with their union activities. . . ."

Congressional intent was also considered at length by Circuit Judge Pope in *N.L.R.B. v. Retail Clerks Inter. Ass'n*, 211 F.2d 759 (9th Cir. 1954):

> "A primary objective of §2(11) of the Act, to which reference is made in this paragraph

> of the decree, was to assure to the employer his right to procure the loyalty and efficiency of his supervisors and managers. The reports which accompanied the legislative bill which Congress enacted into the Labor Management Relations Act of 1947, made this abundantly clear. The reports were specific as to certain evils which the congressional committees thought they could avoid by excluding foremen and other supervisors from the operation of the Labor Act. Much emphasis was laid upon the desirability of assuring their independence of unions of the rank-and-file. It was noted that what had been happening in respect to unionizing of foremen under the former Act was 'bad for output' and hurt the free flow of commerce which the Act was intended to promote . . . ."

Similarly, in *Carpenters District Council, Etc. v. N.L.R.B.*, 274 F.2d 564 (D.C. Cir. 1959), that Court said:

> " . . . Congress was aware of the potential conflict between the obligations of foremen as representatives of their employers, on the one hand, and as union members, on the other. Section 2(3) evidences its intent to make the obligations to the employer paramount. That provision excepts foremen from the protection of the Act. Its purpose was to give the employer a free hand to discharge foremen as a means of ensuring their undivided loyalty, in spite of any union obligations. . . ."

"When a union attempts to organize supervisors, or when supervisors elect to become members of a union, a problem of federal preemption does arise." 4 Jenkins, Labor Law §21.9, The Federal Preemption Doctrine, p. 103. In *San Diego Unions v. Garmon*, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959), Mr. Justice Frankfurter, speaking for the majority, laid down certain guidelines when he said:

> ". . . If the Board decides, subject to appropriate federal judicial review, that conduct is protected by §7 [29 USC §157] or prohibited by §8 [29 USC §158], then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States...." 359 U.S. at p. 245.

In *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L. Ed. 2d 254, 86 S. Ct. 327 (1965), in an opinion by Mr. Justice Harlan, expressing the view of eight members of the Court, it was held that under the circumstances of that case, the federal Act did not preempt the State's jurisdiction. Plaintiffs, employers, declined to negotiate with a union representing the marine engineers until it was established that the union represented a majority of the engineers, whereupon the union picketed plaintiffs' ships. Employers petitioned that a representation election among its engineers be held. The petition was dismissed by the National Labor Relations Board on the ground that the engineers were "supervisors" under the Act and excluded from the definition of employees. The employers' charge, alleging a violation of Section 8 (29 USC §158) of the Act,

was dismissed on the ground that the union's conduct fell outside the provisions of the Act because it sought to represent "supervisors" rather than "employees." Plaintiffs then brought suit in Wisconsin state court seeking injunctive relief. The state court dismissed for lack of jurisdiction. The Supreme Court of Wisconsin affirmed on the ground that the picketing, while illegal under Wisconsin law, arguably violated Sections 8(b)(4)(B) and 8(b)(7) of the Act (29 USC §153(b)(4)(B) and 29 USC §158(b)(7)) and so fell within the exclusive jurisdiction of the National Labor Relations Board. In reversing, the Supreme Court said:

> "The ground rules for preemption in labor law, emerging from our *Garmon* decision, should first be briefly summarized: in general, a State may not regulate conduct arguably 'protected by §7, or prohibited by §8' of the National Labor Relations Act, see 359 US, at 244-246, and the legislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against State regulation, cf. 359 US, at 245."

Thus, after reaffirming the "arguably" test as set out in *Garmon*, *Hanna* recognized an additional aspect of the *Garmon* rule: "(L)egislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation." The Court then determined that because the picketers in *Hanna* were supervisors, their activity was not arguably protected or prohibited by Sections 7 and 8. The union argued, however, that Section 14(a) indicated that Congress had affirmatively adopted a *laissez faire* attitude toward supervisors which brought the case within the second aspect of

the *Garmon* rule and precluded both federal and state regulation. In answering this contention Mr. Justice Harlan said:

> "This broad argument fails utterly in light of the legislative history, for the Committee reports reveal that Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees. Whether the legislators fully realized that their method of achieving this result incidentally freed supervisors' unions from certain limitations under the newly enacted §8(b) is not wholly clear, but certainly Congress made no considered decision generally to exclude state limitations on supervisory organizing. . . ."

The Wisconsin law increased the restrictions on supervisor organizing and so was consistent with the national labor relations policy concerning supervisors. *Hanna*, however, specifically recognizes a national policy established by Congress "to relieve employers from any compulsion under the Act and under state law to coutenance or bargain with any union of supervisory employees." The plaintiffs contend that the North Carolina Right-to-Work Law protects supervisors from discharge based solely upon union membership. If the North Carolina Right-to-Work Law, in fact, does this, the additional burden on employers and the added protection for supervisors would run counter to the legislative intent assigned to Congress by both Mr. Justice Harlan in *Hanna* and the many Circuit Court of Appeals cases herein cited. Preservation of the integrity of a national policy in the field of labor-management relations

is the purpose of the doctrine of federal preemption in this context.

Further insight into the application of the preemption doctrine in situations which do not fall within the "arguably" test of *Garmon* may be found in an analysis of *Teamsters Local 20 v. Morton*, 377 U.S. 252, 12 L. Ed. 2d 280, 84 S. Ct. 1253 (1964). In that case Morton was engaged in hiring out trucks and drivers for use in highway construction. Local 20 represented Morton's employees. During a strike over the terms of a new collective bargaining agreement, Local 20 sought to exert upon Morton various forms of secondary pressure which violated Section 8(b)(4) of the National Labor Relations Act. Local 20 also persuaded the management of one of Morton's customers to refrain from doing business with Morton during the strike. Since the customer was not threatened with any form of reprisal, the persuasion to boycott Morton was not even arguably an unfair labor practice. Local 20 was, likewise, not protected in this activity by the National Labor Relations Act. A persuasive boycott, however, violated Ohio law and the state courts granted compensatory and punitive damages. The United States Supreme Court acknowledged that the union's activity did not bring the case within the *Garmon* rule:

> "It is the respondent's contention, however, that since the petitioner union's peaceful conduct was neither arguably protected under §7 nor arguably prohibited under §8 of the National Labor Relations Act, as amended, the trial court was free to award damages on the basis of state law for injuries caused by this conduct. But even though it may be assumed that at least some of the

> secondary activity here involved was neither protected nor prohibited, it is still necessary to determine whether by enacting §303, 'Congress occupied this field and closed it to state regulation.' *Automobile Workers v. O'Brien*, 339 U.S. 454, 457. The basic question, in other words, is whether 'in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law.' *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 102. . . ."

The Court then determined that a persuasive boycott was precluded from state regulation by the preemption doctrine. The Court said:

> " . . . This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. *Electrical Workers Local 761 v. Labor Board*, 366 U.S. 667, 672. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted §303 [8(b)(4)], the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy. 'For a state to impinge on the area of labor combat designed to

> be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.' *Garner v. Teamsters Union*, 346 U.S. 485, 500. . . ."

To permit a state law to deprive an employer of his right to discharge his supervisor for membership in a union would completely frustrate the congressional determination to leave this weapon of self-help to the employer. Furthermore, the balance of power between labor and management expressed in our national labor policy would be upset. *Oil City Brass Works v. N.L.R.B., supra; N.L.R.B. v. Fullerton Publishing Co., supra; Carpenters District Council, Etc. v. N.L.R.B., supra.* See 85 Harv. L. Rev. 1337, 1351, *Labor Law Preemption Revisited.*

Congress and the federal courts have adopted a national industrial relations policy which gives an employer the right to discharge his supervisor for union membership. The state is precluded from interfering with that policy. "When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the states from acting." *San Diego Unions v. Garmon*, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959). "Incompatible doctrines of local law must give way to principles of federal labor law." *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 7 L. Ed. 2d 593, 82 S. Ct. 571 (1961).

The North Carolina Right-to-Work Law defines certain rights of employers and employees. See *State v. Whitaker, supra; Lincoln Fed. L. U. v. Northwestern I. & M. Co., supra.* However, this state law cannot be construed to

contravene the national policy as between employer and supervisor. When, as in the present case, the facts disclose that plaintiffs as supervisors seek to invoke a remedy precluded by the established national policy, the doctrine of federal preemption applies, and the state court is without jurisdiction over the subject matter of the controversy. For this reason, it is not necessary to consider the other questions raised by the pleadings in this case or discussed in the opinion of the Court of Appeals.

The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals with direction that it remand the case to the Superior Court of Forsyth for entry of judgment affirming the order of Judge Gambill dismissing the action.

Reversed and Remanded.

NORTH CAROLINA RIGHT-TO-WORK LAW

N.C.G.S. Section 95-78. Declaration of public policy. – The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association.

Section 95-79. Certain agreements declared illegal. – Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against the public policy and an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina.

Section 95-80. Membership in labor organization as condition of employment prohibited. – No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer.

Section 95-81. Nonmembership as condition of employment prohibited. – No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.

Section 95-82. Payment of dues as condition of employment prohibited. – No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees, or other charges of any kind to any labor union or labor organization.

Section 95-83. Recovery of damages by persons denied employment. – Any person who may be denied employment or be deprived of continuation of his employment in violation of Sections 95-80, 95-81, and 95-82 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment.

Section 95-84. Application of article. – The provisions of this article shall not apply to any lawful contract in force on the effective date hereof but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of any existing contract.

LABOR-MANAGEMENT RELATIONS ACT

29 U.S.C. Section 164(a). Supervisory employees' rights to organize – Membership as condition of employment – Local law applicable – Declination of jurisdiction by board. – Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act (Sections 151-158, 159-168 of this title) shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

...H CAROLINA
County of Forsyth

File #
In The General C... Court Div...

...
...
...
FORD FAIR OF N. C., INC., and

SUPERIOR

CIVIL SUMMONS

...H CAROLINA

To each of the defendants named below—GREETING:

Defendant	Address
Ray F. Messick	2900 Lowery Street

YOU ARE HEREBY SUMMONED AND NOTIFIED to appear ... Forsyth County within 30 days after service of this Summons upon you, exclusive of the day of such service, and defend the above entitled action as follows: a written Answer to the Complaint must be served upon the plaintiff or his attorney within THIRTY DAYS after the service of this Summons and a copy thereof must be filed at the office of the undersigned clerk. If you fail to do so, the plaintiff will apply to the court for the relief demanded in the Complaint.

Issued at 3:42 o'clock P.M., this 14 day of October, 1971.

...Attorney
Address
817 NCNB Building
...
Telephone: (919) 723-0741

Deputy/Assistant/Clerk of Superior Court

RETURN OF SERVICE

I certify that this Summons was received on the ____ day of _____, 19___, and together with the Complaint was served as follows:

On _____ on the ____ day of October, 19 71, at the following place: _____ By:
Ray F. Messick (Fill in address where copy was delivered or left) 71

☐ delivering copies to him personally. ☐ leaving copies with _____ who is a person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of abode.

On _____ on the ____ day of _____, 19___, at the following place: _____ By:
(Fill in address where copy was delivered or left)

☐ delivering copies to him personally. ☐ leaving copies with _____ who is a person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of abode.

If not served on defendant, state reason and give his name: _____

Fee $ _____ _____ Sheriff of _____ County, N. C.
Paid _____ By: _____ Deputy
By _____ Date _____

G.S. 1A-1, Rule 4
AOC-L Form 49
Rev 8/70

STATE OF NORTH CAROLINA
County of Forsyth

File # 71-CVS-5060
In The General Court of Justice
Court Division
SUPERIOR

[redacted]
Against
[redacted]

CIVIL SUMMONS

To each of the defendants named below---GREETING:

Defendant	Address
Pond Fair of N. C., Inc.	Make service upon Ray F. Monnich, President

YOU ARE HEREBY SUMMONED AND NOTIFIED to appear [redacted] above entitled civil action as follows: a written Answer to the Complaint [redacted] or his attorney within THIRTY DAYS after the service of this Summons and a copy thereof must be filed at the office of the undersigned clerk. If you fail to do so, the plaintiff will apply to the court for the relief demanded in the Complaint.

Issued at 3:42 o'clock P.M., this 14 day of October, 1971.

[redacted] Attorney
Address
[redacted]
Telephone: (919) 723-0741

Deputy/Assistant/Clerk of Superior Court

RETURN OF SERVICE

I certify that this Summons was received on the ____ day of _____, 19__, and together with the Complaint was served as follows:

On _____ on the ____ day of October, 19 71, at the following place: Pond Fair of N. C., Inc. By: _____
by serving Ray F. Monnich (fill in address where copy was delivered or left)

☐ delivering copies to him personally. ☐ leaving copies with _____ who is a person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of abode.

On _____ on the ____ day of _____, 19__, at the following place: _____ By: _____
(fill in address where copy was delivered or left)

☐ delivering copies to him personally. ☐ leaving copies with _____ who is a person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of abode.

If not served on defendant, state reason and give his name: _____

Fee $ _____ _____ Sheriff of _____ County, N. C.
Paid _____ By: _____ Deputy
By _____ Date _____

G.S. 1A-1, Rule 4
AOC-L Form 49
Rev 8/70

[Filed]

COMPLAINT

COMES NOW the Plaintiffs, and complaining of the Defendants, says and alleges:

I.

That the Plaintiffs are residents of the State of North Carolina and were residents of this State at all times material herein.

II.

The Defendant Food Fair of N.C., Inc., is a North Carolina corporation operating at all times material herein a number of grocery stores in Forsyth County, North Carolina.

III.

That Defendant Ray F. Messick is a resident of Winston-Salem, North Carolina and is an officer and director of the above-mentioned corporate defendant.

IV.

That each of the Plaintiff's were employed by the Defendant Food Fair for at least 10 years prior to June 25, 1971 in its Winston-Salem, North Carolina stores, and at all times material herein, had contracts of employment with said Defendant whereby Plaintiffs were to serve Defendants as meat market managers for a weekly wage.

V.

That in April, 1971, the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, instituted an organizing campaign among Defendant Food Fair's meat department employees, and following a National Labor

Relations Board election on June 24, 1971, said labor organization was certified as collective bargaining representative for all of said Defendants' meat market employees.

VI.

That Plaintiffs joined said labor organization in April and May, 1971 and that Defendants Food Fair and Messick had knowledge of this prior to June 24, 1971.

VII.

That on June 25 and 27, 1971, Defendant Messick, acting individually and as agent for Defendant Food Fair of N.C., Inc., discharged the Plaintiffs because of their membership in said labor organization, all in violation of the laws and General Statutes of the State of North Carolina.

VIII.

That as a direct and proximate result of the Defendants' conduct, Plaintiffs have been embarrassed and humiliated in their community, have lost all means of income for the support of themselves and their families, have been unable to find other employment, and have been otherwise permanently damaged in the amount of $500,000.00.

IX.

That the conduct complained of was willful, reckless, malicious, and without the slightest regard for the rights guaranteed the Plaintiffs by the General Statutes of North Carolina, and therefore, Plaintiffs are entitled to punitive and smart money damages in the amount of $1,000,000.00.

WHEREFORE, Plaintiffs pray for the following relief:

(a) That they have and recover of the Defendants the sum of $500,000.00 actual damages.

(b) That they have and recover of the Defendants the sum of $1,000,000.00 in punitive damages.

(c) That Defendants be taxed with the costs of this action; and

(d) For such other and further relief as to the Court seems just and proper.

EUBANKS AND SPARROW

/s/ Larry L. Eubanks
Larry L. Eubanks
Attorney for Plaintiffs
417 NCNB Building
Winston-Salem, North Carolina
27101
Telephone: (919) 723-0741

[Filed December 14, 1971]

MOTION TO DISMISS, MOTION FOR JUDGMENT ON THE PLEADINGS, and PLEA IN ABATEMENT

NOW COMES the defendant Food Fair of N.C., Inc., pursuant to Rule 12 of the North Carolina Rules of Civil Procedure, and respectfully moves the Court as follows:

I. *To dismiss the action* for failure to state a claim upon which relief can be granted by this Court, and for want of jurisdiction over the subject matter. In support of this Motion, the defendant respectfully shows the Court:

(a) The National Labor Relations Board has exclusive jurisdiction over the subject matter of this action.

(b) On June 28, 1971, plaintiffs filed a charge with the National Labor Relations Board alleging unfair labor practice in violation of Section 7 and Section 8(a)(1) and (3) of the Labor Management Relations Act (29 U.S.C. 7, 151 *et seq.), N.L.R.B. 11-CA-4622,* a copy of which is attached hereto as Exhibit 1 to this Motion and incorporated herein as if fully set forth in this paragraph.

(c) The same subject matter is alleged in the Complaint in the present action.

(d) The National Labor Relations Board is empowered to award a remedy not less than that authorized by North Carolina General Statute 95-83.

(e) This charge is pending before the National Labor Relations Board which has exclusive jurisdiction over unfair labor practices brought before it. (See *Douglas Aircraft v. Local Union 379,* IBEW 247 N.C. 620; 101 S.E. 2d 800, at page 806).

(f) The aforesaid charges brought before the National Labor Relations Board are still pending by virtue of an appeal taken by the present plaintiffs from a decision of the Regional Director, a copy of which appeal is attached hereto as Exhibit 2 and incorporated herein as if fully set forth in this paragraph.

II. *To dismiss the action* on the ground that the plaintiffs have already been adjudicated not to be employees by the National Labor Relations Board, and, therefore, do not come within the purview of North Carolina General Statute 95-78 *et seq.*, upon which the present action is based. In support of said Motion, the defendants respectfully show the Court:

(a) Plaintiffs were adjudicated to be supervisors within the meaning of the Labor Relations Act (29 U.S.C. 7,

sections 2(3) and 2(11), by the National Labor Relations Board by Order dated June 3, 1971, a copy of which Order is attached hereto as Exhibit 3 and incorporated herein as if fully set forth; and as supervisors, they are management personnel and not subject to the provisions of General Statute 95-78 *et seq.*

III. *By way of Plea in Abatement*, the defendants respectfully show the Court:

(a) The aforesaid charges pending before the National Labor Relations Board were instituted prior to the present action, and involved the same parties and subject matter of the present action. The defendants respectfully submit that the plaintiffs are not entitled to maintain the present action by virtue of the aforesaid prior action, which is still pending.

IV. *To dismiss the action* for misjoinder of claims and for failure to state claim upon which relief can be granted, and in support of said Motion, defendant respectfully shows the Court:

(a) The Complaint alleges violations as to all four plaintiffs, but alleges damages collectively, and does not define or allege what damages were suffered by each plaintiff individually, making it impossible for defendant to defend against the claims of the individual plaintiffs.

VI. *In the alternative*, the defendant moves to dismiss and for judgment on the pleadings as to Paragraph IX of the Complaint and subparagraph (b) of the prayer for relief pertaining to punitive damages, on the ground that such punitive damages are not recoverable in this action as a matter of law. See C.S. 95-83.

WHEREFORE, the defendant Food Fair of N.C., Inc. respectfully prays the Court that the plaintiffs' motion be dismissed; and, in the alternative, if the entire Motion is not allowed, that that portion of the Complaint seeking to recover punitive damages be stricken and dismissed.

This the 14th day of December, 1971.

McCAUL, GRIGSBY and PEARSALL

/s/ By Robert G. Moss
Robert G. Moss

HUDSON, PETRKE, STOCKTON, STOCKTON & ROBINSON

/s/ By R. M. Stockton, Jr.
R. M. Stockton, Jr.

Attorneys for Defendants

[Certificate of Service, dated December 14, 1971]

[Dated February 23, 1972]

AFFIDAVIT

RAY F. MESSICK, being duly sworn, deposes and says:

I am President of Food Fair of N.C., Inc., one of the defendants in this action. I am the President and chief operating officer of this defendant corporation.

Each of the plaintiffs in this action was at the times alleged a manager of the meat market of one of the stores owned and operated by the defendant, Food Fair of N.C., Inc. There is a meat market at each of the corporate

defendant stores and the plaintiffs, as meat market managers at their respective stores, were not responsible to either the store manager or the assistant manager. The meat markets were operated independently and each of the plaintiffs had full supervisory authority over said meat market and the employees in the meat market. Each of the plaintiffs was supervisor of his respective meat market and its employees and had authority to hire, fire or discipline meat market employees, responsibility for directing them and adjusting their grievances by the use of their independent judgment.

The plaintiffs, as meat market managers, independently and on their own authority scheduled regular hours and overtime hours for meat market employees. Each of the plaintiffs, as meat market managers, exercised their authority to grant time off and to tell meat market employees what to do in their employment in the meat market. Each of the plaintiffs were paid more than other employees, were provided more life insurance by the defendant corportion, got more sick leave and a larger Christmas bonus, as well as a year-end bonus, which the other meat market employees did not receive.

On June 3, 1971, the Regional Director of the Eleventh Region of the National Labor Relations Board issued an order adjudicating Ulysses Vernon Beasley, James A. Kiger, Emidio J. Bassetti and Joe W. Jones, plaintiffs in this case, as supervisors. This order also included all other meat managers of the defendant corporation.

There is attached to this affidavit a true copy of the decision of the NLRB.

/s/ Ray F. Messick
Ray F. Messick

[Notarization]

December 30, 1971

Larry L. Eubanks, Esq.
417 North Carolina Nat'l Bank Bldg.
Winston-Salem, North Carolina 27101

Re: Food Fair of North Carolina, Inc., 11-CA-4622

Dear Mr. Eubanks:

Your appeal in the above matter has been duly considered.

The appeal is denied. The four alleged discriminatees involved herein were supervisors within the meaning of Section 2(11) of the Act and hence were not entitlted, in the circumstances herein, to the protection of the act.

Very truly yours,
Peter G. Nash
General Counsel

By: /s/ IRVING HERMAN
Director, Office of Appeals

Copies of the letter were received by Ray F. Messick, President of Food Fair of N.C., Inc., Robert C. Moss, Esq., his attorney and others.

A. 31

Supreme Court of the United States

No. A-1073 , ~~October Term, 19~~

ULYSSES VERNON BEASLEY, ET AL

Petitioners

v/

FOOD FAIR OF NORTH CAROLINA, INC. ET AL

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

May 27, 19 73

s/Warren E. Burger

Chief Justice of the United States.

Dated this 26

day of April, 19 73

[Issued February 28, 1972]

ORDER and JUDGMENT

THIS CAUSE having been calendared for hearing on the Motion Docket at the February 21, 1972 week of Civil Court in and for Forsyth County, and having come on for hearing before the undersigned Judge of the Superior Court upon the defendants' Motion To Dismiss, Motion For Judgment On The Pleadings, and Plea In Abatement, and all parties having been represented by counsel at said hearing before the undersigned Judge and having filed briefs and presented arguments for their respective clients and positions in the matter;

And the Court having considered the Motion To Dismiss, Motion For Judgment On The Pleadings, and Plea In Abatement; and the parties having stipulated that each of the plaintiffs in this cause was at all times complained of a supervisor of Food Fair of N.C., Inc.; and the defendants having further filed Affidavit of Ray F. Messick, dated February 23, 1972, without objection; and the Court having further considered the Motions filed as a Motion For Summary Judgment as provided under Rule 12(c) and Rule 56;

And the Court, having heard the matter and the arguments of counsel for all parties in the same, being of the opinion that the defendants' Motion For Judgment On The Pleadings and To Dismiss should be allowed for that the plaintiffs have failed to state a claim upon which relief can be granted; and the Court being further of the opinion that the defendants are entitled to summary judgment in their favor pursuant to Rule 56 in that the pleadings, stipulation and affidavits show that there is no genuine issue as to any material fact and that the defendants are so

entitled to judgment as a matter of law; and the parties having agreed that the Judgment be presented on this date;

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that the defendants' Motion for Judgment On The Pleadings and To Dismiss is hereby allowed; that the Court has further considered said Motion as a Motion For Summary Judgment and that the defendants' Motion For Summary Judgment is hereby allowed; that this action be and the same is hereby dismissed with prejudice; and that the costs of the action be taxed against the plaintiffs.

This the day of February, 1972.

Judge Presiding

[Issued February 28, 1972]

APPEAL ENTRIES

To the entry of the foregoing Judgment dated February 28, 1972, and for errors assigned and to be assigned, defendant in apt time objects, excepts and gives Notice of Appeal in Open Court. Further notice is waived. Appeal bond in the sum of $100.00 is adjudged sufficient. Plaintiff is hereby allowed 30 days to serve statement of case on appeal upon defendant; And defendant is hereby allowed 20 days thereafter to serve a countercase or exception.

This the 28th day of February, 1972.

/s/ Robert M. Gambill
Robert M. Gambill, Judge Presiding

[Dated]

ASSIGNMENT OF ERROR

The Trial Judge erred in dismissing plaintiffs action because they have been discharged from employment because of Membership in a labor organization and therefore are entitled to the protection of North Carolina General Statutes 95-78 *et seq.*

This is plaintiffs sole assignment of error which is their exception located at R.p. _____.

_____

W. Warren Sparrow, *Attorney for Plaintiffs*

Of Counsel:

EUBANKS AND SPARROW
417 NCNB Building
Winston-Salem, North Carolina 27101
(910) 723-0741